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Civil Practice—Power of a Court to Disqualify Attorneys

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as answered by its decision in *Hanna v. Stedman*,⁴ which held that for the purposes of an action of interpleader, a debt is not a *res* which permits an adjudication *in rem*, but rather requires *in personam* jurisdiction of the parties.⁵ Thus the court held that although the British subject's New York *remedy* was barred by the statutory limitation of §51-a, defendant remained liable to suit in sister states where it maintained assets and where different periods of limitation were provided. The obvious fact that the intent of §51-a was to protect New York debtors from double liability, influenced the court's ultimate determination that the defendant could apply for remission of the sum paid into court and continue to defend the action.⁶ The Court thus held C. P. A. §133, which provides for discharge of the debtor from liability upon payment into court, inapplicable where, under §51-a, an indispensable party has failed to appear.⁷ The Court stated that the sole purpose of the deposit of security was to protect plaintiff, and not to discharge defendant from liability as in an action of interpleader. Thus §51-a was construed as a statute of limitation, designed to protect New York debtors from double liability and harassing suits. Where defendant has paid the money into court, and where because a claimant does not appear, the danger of a later suit in a foreign jurisdiction persists, the debtor is permitted to defend on the ground that the indispensable party has not been joined.

Power of a Court to Disqualify Attorneys

One of the inherent powers of all courts of record is the power, in a proper case, to disqualify an attorney from appearing in a matter pending before that court.⁸ For example, where an attorney possesses privileged information concerning an opposing party the court may bar the attorney's appearance on the ground that the party's right to a fair hearing may be prejudiced.⁹ The further power to discipline or suspend an attorney for professional

4. 230 N. Y. 326, 130 N. E. 566 (1921).

5. But see *Feuchtwanger v. Central Hanover Bank and Trust Co.*, 288 N. Y. 342, 43 N. E. 2d 434 (1942); Note, 37 CORN. L. Q. 533 (1952).

6. Bulletin #50 pp. 147-148 (1939) by Henry R. Fraser, Legislative Reporter of the New York State Bar Assn.

7. C. P. A. § 133 reads: "A party bringing money into court pursuant to the direction of the court is discharged thereby from all further liability to the extent of the money so paid."

8. *Brown v. Miller*, 286 F. 944 (D. C. Cir., 1922).

9. *Watson v. Watson*, 171 Misc. 175, 11 N. Y. S. 2d 537 (Sup. Ct. 1939).

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misconduct or crime is conferred by statute.¹⁰ In New York, jurisdiction of such matters is vested in the Appellate Division of the Supreme Court by Judiciary Law §90.¹¹

A novel problem concerning the distinction between the power to disqualify and the power to suspend was before the Court of Appeals in *Erie County Water Authority v. Western New York Water Company*.¹² The question presented was whether an order of the Erie County Court, which denied a motion by the defendant company to bar the appearance of plaintiff's attorney in a condemnation proceeding pending before that Court, was a valid exercise of the Court's power or a futile attempt to rule on a matter solely within the jurisdiction of the Appellate Division.

Prior to the present litigation, counsel for the Authority had served as an attorney for the Public Service Commission. In that capacity he had represented the Commission in proceedings against defendant company. He terminated his employment with the Commission in order to accept a retainer from the Authority to prosecute this condemnation action. When the case came on before the County Court, defendant moved to bar plaintiff's attorney from appearing. The grounds urged for granting the motion were that the attorney possessed privileged information concerning defendant, which he gained while in the employ of the P. S. C., and that his appearance in this matter would be a violation of Public Service Law §15¹³ and Canon 36 of the Canons of Professional Ethics of the American Bar Association.¹⁴ After a hearing the County Court denied the motion in an opinion in which the following question was asked: "Did Olmsted [plaintiff's attorney]

10. *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 162 N. E. 487 (1928).

11. JUDICIARY LAW § 90 (2):

"The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice * * *"

12. 304 N. Y. 342, 107 N. E. 479 (1952).

13. PUBLIC SERVICE LAW § 15 provides in part:

"Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any inspection or examination of the property, accounts, records or memoranda of any person, corporation or municipality subject to the jurisdiction of the commission, except insofar as he may be directed to do so by the commission, or by a court or judge, or authorized by law, shall be guilty of a misdemeanor."

14. CANON 36 provides:

"A lawyer having once held public office or having been in the public employment, should not, after his retirement, accept employment in connection with any matter which he had investigated or passed upon while in such office or employ."

investigate or pass upon this matter while acting as an attorney for the Public Service Commission?" The question was answered negatively and Olmsted was granted leave to appear. The Appellate Division affirmed the order but solely on the ground that the County Court had no jurisdiction of the motion.¹⁵

The problem before the Court of Appeals was essentially one of characterizing the order of the County Court. The defendant argued that the proceedings below involved neither censure nor suspension, but only disqualification in a particular matter. A majority of the Court found no basis for that position and instead viewed the motion as an accusation of professional misconduct. It held that if the order was predicated upon a decision as to the merits of that accusation it was a futile attempt to exercise a power vested in the Appellate Division. The dissent accepted defendant's contention and held the view that this was not a disciplinary proceeding within the scope of Judiciary Law §90. The minority felt that, although the motion reflected indirectly upon counsel's professional conduct, it was incidental and not serious.

It appears that the error below resulted from the County Court misapprehending the basis for exercising its power to disqualify. Instead of confining itself to the question whether Olmsted did possess privileged information, which might be used to the defendant's prejudice, it made a finding as to the propriety of his appearance under the Canons of Ethics. The holding here makes it clear that such a question is cognizable only by the Appellate Division under Judiciary Law §90. Although defendant's motion only asked disqualification in this particular action it did not give the County Court the power to rule on a matter over which the Appellate Division has exclusive jurisdiction.

Pleading—Liability of Unincorporated Associations

Under the common law, an unincorporated association is not capable of suing or being sued in its common or association name. Unlike a corporation, it has no existence apart from its members.¹⁶ Nor is it a partnership; the distinction being that a partnership is organized for monetary gain, whereas a voluntary association is organized for moral, benevolent, social or political purposes.¹⁷ For that reason no authority to create personal liability is implied

15. *Erie County Water Authority v. Western New York Water Company*, 279 App. Div. 712, 108 N. Y. S. 2d 721 (4th Dep't 1951), cert. denied, 21 U. S. L. Week 3145.

16. *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919 (1900); *Brown v. The Protestant Episcopal Church*, 8 F. 2d 149 (E.D. La. 1925); See note, 149 A.L.R. 510.

17. *Lafonde v. Deems*, 81 N. Y. 508 (1880).